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## COMMENTS

# PROBABLE CAUSE IN A WORLD OF PURE IMAGINATION: WHY THE CANDYMAN WARRANTS SHOULD NOT HAVE BEEN GOLDEN TICKETS TO SEARCH

FRANCIS A. CAVANAGH<sup>†</sup>

*Then if any one at all is to have the privilege of lying, the rulers of the State should be the persons; and they, in their dealings either with enemies or with their own citizens, may be allowed to lie for the public good.<sup>1</sup>*

## INTRODUCTION

Throughout our nation's history, courts have struggled to balance the individual's right to be free from unreasonable searches and seizures against law enforcement's need to protect the community. All Americans have a fundamental right to be free from "rash and unreasonable interferences with privacy and from unfounded charges of crime,"<sup>2</sup> yet law enforcement officials have legitimate and practical needs to discover information in connection with their efforts to investigate crime and protect the public interest.<sup>3</sup> The Fourth Amendment to the Constitution was

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<sup>1</sup> PLATO, THE REPUBLIC 64 (Benjamin Jowett trans., Project Gutenberg ed. 1994) (360 B.C.), available at <http://www.gutenberg.org/dirs/etext94/repub13.txt>.

<sup>2</sup> *Brinegar v. United States*, 338 U.S. 160, 176 (1949); see also *Wilson v. Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."); *Payton v. New York*, 445 U.S. 573, 585 (1980) ("[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.") (citation and internal quotation marks omitted); *Brown v. Texas*, 443 U.S. 47, 51 (1979) ("A central concern [is] . . . to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."); *Lauro v. Charles*, 219 F.3d 202, 211 (2d Cir. 2000) (describing the particular gravity the Fourth Amendment accords to government intrusions on privacy of the home).

<sup>3</sup> *United States v. Martin*, 426 F.3d 68, 76 (2d Cir. 2005) (acknowledging the need for law enforcement to have a certain amount of latitude in conducting criminal investigations); *Brown*, 443 U.S. at 50 (noting that "[t]he reasonableness of

designed to aid the courts in striking a balance between these two conflicting interests: law enforcement must first establish probable cause before a court will issue a search warrant.<sup>4</sup> But despite the Fourth Amendment's guidance, courts have found it difficult to strike such a balance because, in each case, the individual's right to engage in a particular activity varies, as does the nature of the crime under investigation. Not surprisingly, the concept of probable cause has been subject to a great deal of uncertainty because it must remain adaptable to all situations.<sup>5</sup>

Recently, in *United States v. Martin*<sup>6</sup> and *United States v. Coreas*,<sup>7</sup> the Court of Appeals for the Second Circuit held that the defendants' memberships in online child pornography e-groups<sup>8</sup> were sufficient to establish probable cause for obtaining search warrants of their computers and homes.<sup>9</sup> This Comment critically analyzes both decisions and submits that *Martin* and *Coreas* 1) erred in finding probable cause, and 2) consequently established a precedent that seriously threatens First and Fourth Amendment protections.

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seizures . . . depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers") (citation and internal quotation marks omitted).

<sup>4</sup> The full text of the Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>5</sup> See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."); see also *Holmes v. State*, 796 A.2d 90, 98 (2002) ("With the possible exception of 'due process,' there is probably no two-word term in American law that has produced as much confusing commentary as 'probable cause' . . .").

<sup>6</sup> 426 F.3d 68 (2d Cir. 2005).

<sup>7</sup> 419 F.3d 151 (2d Cir. 2005).

<sup>8</sup> An "e-group," also known as an internet forum, is a website that allows users to interact by engaging in online chats and by posting messages, pictures, videos, and other web-content. *Martin*, 426 F.3d at 70 n.1. Unlike most web pages where one individual has permission to control the content of the page, e-group members usually control the content of the e-group pages with very little supervision from the individual who creates the e-group. See *United States v. Froman*, 355 F.3d 882, 885 (5th Cir. 2004).

<sup>9</sup> See *Martin*, 426 F.3d at 73; see also *Coreas*, 419 F.3d at 159 (affirming *Coreas*' conviction, therefore implicitly finding probable cause, because the court was bound by the precedent set by *Martin*).

These cases arose out of Operation *Candyman* ("Operation"), a nationwide government investigation of persons suspected of collecting and distributing child pornography over the internet.<sup>10</sup> During the investigation, the government searched the computers and homes of numerous suspects<sup>11</sup> and eventually arrested approximately ninety to one hundred individuals for the possession of child pornography.<sup>12</sup> Most of the Operation's searches were conducted pursuant to warrants supported by the affidavit of FBI Special Agent Geoffrey S. Binney (the "Affidavit" or "Binney's Affidavit").<sup>13</sup> In the Affidavit, Binney outlined the nature of five child pornography e-groups to which he subscribed during his investigation.<sup>14</sup> The two e-groups at issue in *Martin* and *Coreas* were called *Candyman* and *girls12-16*.<sup>15</sup> *Candyman's* welcome page contained only text and stated "[t]his group is for People who love kids. You can post any type of messages you like too [sic] and any type of pics and vids you like too. P.S. IF WE ALL WORKED [sic] TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET."<sup>16</sup> In addition, the following description

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<sup>10</sup> *Martin*, 426 F.3d at 69.

<sup>11</sup> In one case, the government searched the suspect's work computer and workplace. See *United States v. Bailey*, 272 F. Supp. 2d 822, 826 (D. Neb. 2003).

<sup>12</sup> The exact number of suspects searched and later charged is unclear. See *89 Charged, Some Clergy, in Web Child-Porn Ring*, SEATTLE TIMES, Mar. 19, 2002, at A5; Tim Bryant, *Two Area Men are Charged in Child Porn Sweep Internet Ring Spanned 26 States, Officials Say*, ST. LOUIS POST-DISPATCH, Mar. 19, 2002, at B3 (1,400 *Candyman* members in United States); Jon Carroll, *Operation Candyman Gets Sticky*, S.F. CHRON., Mar. 11, 2003, at D8 (700 homes searched); Larry Neumeister, *Judges Cite FBI Failings in Child Porn Cases*, CINCINNATI POST, Mar. 7, 2003, at 30 (more than 100 arrests); Jerry Seper, *FBI Cracks Web Child-Porn, Pedophile Ring*, WASH. TIMES, Mar. 19, 2002, at A03 (forty suspects already in custody); David Stout, *90 Are Arrested in Inquiry into Internet Child-Sex Ring*, N.Y. TIMES, Mar. 19, 2002, at A16.

<sup>13</sup> See *Coreas*, 419 F.3d at 152 ("Binney . . . drafted an affidavit that law enforcement officials around the country relied on to support applications for search warrants to search the private residences of hundreds of people whose e-mail addresses were on these lists."); *Martin*, 426 F.3d at 69–70; *United States v. Froman*, 355 F.3d 882, 886 (5th Cir. 2004); *United States v. Kunen*, 323 F. Supp. 2d 390, 396 (E.D.N.Y. 2004); *United States v. Bailey*, 272 F. Supp. 2d 822, 830 (D. Neb. 2003); *United States v. Fantauzzi*, 260 F. Supp. 2d 561, 563 (E.D.N.Y. 2003); *United States v. Strauser*, 247 F. Supp. 2d 1135, 1137 (E.D. Mo. 2003); *United States v. Perez*, 247 F. Supp. 2d 459, 463 (S.D.N.Y. 2003).

<sup>14</sup> See *Bailey*, 272 F. Supp. 2d at 827.

<sup>15</sup> *Coreas*, 419 F.3d at 152; *Martin*, 426 F.3d at 70–72.

<sup>16</sup> *Kunen*, 323 F. Supp. 2d at 391–92.

was given in the center of the page: "Category: Top: Adult: Image Galleries: Transgender: Members."<sup>17</sup> The *girls12-16* welcome message indicated, even more explicitly, that the e-group was used for trading child pornography.<sup>18</sup> Despite the differences in welcome messages, a first time user of either e-group "would have had some idea that the site provided access to child pornography."<sup>19</sup> Other than the differences in the welcome messages, the Affidavit described both e-groups as having "many of the same features."<sup>20</sup> Of particular importance was the

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<sup>17</sup> *Perez*, 247 F. Supp. 2d at 464.

<sup>18</sup> The full text of the welcome message read:

Hi all, This group is for all those ho [sic] appreciate the young female in here [sic] finest form. Watching her develop and grow is like poetry in motion [sic], to an age where she takes an interest in the joys and pleasures of sex. There is probably nothing more stimulating than watching a young teen girl discover the pleasures of the orgasm. The joy of feeling like she is actually coming into womanhood. It's an age where they have no preconditions about anything, just pure openness [sic]. What a joy to be a part of that wonderful experience and to watch the development of this perfect form. This is the place to be if you love 11 to 16 yr olds. You can share experiences with others, share your views and opinions quite freely without censorship. You can share all kinds of other information as well regarding—your current model: if you are a photographer. Where the best place to meet gits [sic] is. The difficulties you experience in your quest. The best way to chat up. Good places to pick girls up. Girls you would like to share with others. The choice is all yours. Welcome home! Post videos and photographs . . . and how about your true life experiences with them so that other viewers can paint a mental picture and in [sic] some ways share the experience with you. You could connect with others from the same country as you and get together social [sic] if you wish. The choice is all yours. How about a model resource for photographers? It's all up to you and is only limited by your own imaginations. Membership is open to anyone, but you will need to post something. Mybe [sic] a little bit about yourself/what your interests are (specifically), your age, location . . . and a pic or vid would be a good to [sic]. By doing this other members (or potential members) with the same interest may then contact you if you wish them to.

*Martin*, 426 F.3d at 71.

<sup>19</sup> *Perez*, 247 F. Supp. 2d at 464.

<sup>20</sup> *Martin*, 426 F.3d at 71 n.3. The Affidavit stated that a user had access to the following:

(1) a "Files" section allowed users to post images and video clips for other members to access and download; (2) a "Polls" section "allowed *Candyman* E-group members to answer survey questions, such as "what age group do you prefer?"; (3) a "Links" section permitted members "to post URLs for other web sites containing similar content"; (4) a "Chat" section enabled members "to engage in real time chat conversations with each other"; (5) an e-mail list, to which all new members were automatically added, circulated messages and files when they were sent to the e-group; and (6) a "Messages" area stored all the messages and files transmitted to the group

Affidavit's statement that all members automatically received e-mails from the groups.<sup>21</sup> From January 2, 2001, when Binney joined the e-groups, until the e-groups were shutdown, Binney received approximately 500 e-mails.<sup>22</sup> Of these 500, Binney stated that approximately 300 e-mails contained files of child pornography or child erotica.<sup>23</sup> Thus, according to the Affidavit, all members of the e-groups during this period *automatically* downloaded child pornography through their e-mail.<sup>24</sup>

Binney's successor, Special Agent Kristen Sheldon, soon discovered that there was reason to doubt some of Binney's statements.<sup>25</sup> Specifically, Agent Sheldon was on notice that there were, or at the very least that there *might* have been, e-mail options for e-group users permitting them to choose not to receive automatic downloaded messages.<sup>26</sup> In spite of her doubts, in a draft affidavit based on Binney's original statements, Sheldon indicated that upon joining, all e-group members automatically received e-mails.<sup>27</sup> In early 2002, Sheldon sent this draft affidavit to some 700 FBI field offices around the country.<sup>28</sup> Using the affidavit and the e-groups' membership lists, several agents applied for and obtained search warrants for various suspects' homes and computers.<sup>29</sup> Pursuant to these warrants, the FBI searched the homes of suspected persons nationwide and found many of them in possession of child pornography.<sup>30</sup> Many of the suspects were arrested and charged with *possessing* child pornography in violation of

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so that members could review them later.

*Id.* at 70. Because the *Martin* court asserts that only the welcome messages distinguish the websites, this Comment will assume that all evidence, including content and usage statistics, are applicable to both e-groups.

<sup>21</sup> United States v. Shields, 458 F.3d 269, 272 (3d Cir. 2006).

<sup>22</sup> *Martin*, 426 F.3d at 70.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*; see also *Perez*, 247 F. Supp. 2d at 462.

<sup>25</sup> See *Perez*, 247 F. Supp. 2d at 468–69.

<sup>26</sup> *Id.* at 468.

<sup>27</sup> *Id.* As the warrants were executed, more information emerged confirming Sheldon's suspicions. *Id.*; see *infra* note 32 and accompanying text.

<sup>28</sup> See *Perez*, 247 F. Supp. 2d at 468–69.

<sup>29</sup> *Id.* at 461.

<sup>30</sup> See, e.g., United States v. Strauser, 247 F. Supp. 2d 1135, 1136 (E.D. Mo. 2003); *Perez*, 247 F. Supp. 2d at 461.

18 U.S.C. § 2252A(a)(5)(B).<sup>31</sup> Martin and Coreas were two of these defendants.

Subsequently, as some of the warrants were executed, Agent Sheldon confirmed her doubts. Most importantly, Agent Sheldon verified that not all members received the pornography-containing e-mails automatically after joining the e-groups.<sup>32</sup> At trial, the defendants sought to suppress the evidence collected pursuant to the warrants. The defendants argued that the statements made in the Affidavit were knowingly or recklessly false and that the evidence, absent the false statements, was insufficient to establish probable cause for a search warrant.<sup>33</sup> Despite the shortcomings of Binney's Affidavit, in many of these cases, the district courts upheld the validity of the search

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<sup>31</sup> 18 U.S.C. § 2252A(a)(5)(B) (Supp. 2005). The statute provides in relevant part:

(a) Any person who—

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(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer,

....

shall be punished as provided in subsection (b).

*Id.*

<sup>32</sup> *Perez*, 247 F. Supp. 2d at 468–69 (“In May 2002, Sheldon learned from an FBI agent . . . that Yahoo had submitted an affidavit in a *Candyman* case stating that there had been e-mail delivery options. . . . At some point in mid-2002, the Government started to acknowledge . . . that the search warrant affidavits had contained an error . . . .”) (internal citation omitted).

<sup>33</sup> *See, e.g.*, *United States v. Coreas*, 419 F.3d 151, 154 (2d Cir. 2005); *Perez*, 247 F. Supp. 2d at 469 (“[D]efendants in different *Candyman* cases moved to suppress evidence obtained as a result of the search warrants.”); *see also* *United States v. Schmidt*, 373 F.3d 100, 103 (2d Cir. 2004) (citing several published and unpublished *Candyman* opinions).

warrants.<sup>34</sup> Martin and Coreas, along with these other defendants, were convicted of possession of child pornography.<sup>35</sup>

On appeal, Martin and Coreas once again argued that absent the false statements, the evidence was insufficient to establish probable cause for obtaining search warrants of their homes and computers.<sup>36</sup> In *Martin*, the defendant was a member of the *girls12-16* e-group.<sup>37</sup> In that case, the Second Circuit outlined the probable cause standard as requiring a judge to make a “‘practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.’”<sup>38</sup> After examining the e-group’s welcome message<sup>39</sup> and its technological features that facilitated the trading of child pornography,<sup>40</sup> the court concluded that “the overriding, if not the sole, purpose of the *girls12-16* e-group was illicit.”<sup>41</sup> The Affidavit extensively outlined the *modus operandi* of child pornography collectors, explaining that they gather the material through e-groups, e-mail, bulletin boards, and file transfers, store it, and rarely destroy it.<sup>42</sup> The Affidavit also established that a *girls12-16* member used the e-mail address Joeym@optonline.net, that this member did not cancel his membership during the Operation, and that this same member was an occupant of Martin’s house.<sup>43</sup> In the majority’s view, this remaining evidence established probable cause to issue the search warrant; “[i]t is common sense that an individual who

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<sup>34</sup> See, e.g., *United States v. Bailey*, 272 F. Supp. 2d 822, 824 (D. Neb. 2003). *But see* *United States v. Kunen*, 323 F. Supp. 2d 390, 396–97 (E.D.N.Y. 2004) (questioning the basis for Binney’s conclusions in the Affidavit); *United States v. Strauser*, 247 F. Supp. 2d 1135, 1137 (E.D. Mo. 2003) (“In fact, the vast majority of *Candyman* subscribers, including defendant Strauser, had exercised the ‘no mail’ option, where they did not receive emails . . .”); *United States v. Perez*, 247 F. Supp. 2d at 463 (emphasizing the Government’s efforts to notify defense counsel that parts of the Affidavit were in fact false).

<sup>35</sup> *Coreas*, 419 F.3d at 155; *United States v. Martin*, 426 F.3d 68, 69 (2d Cir. 2005).

<sup>36</sup> *Coreas*, 419 F.3d at 155; *Martin*, 426 F.3d at 69.

<sup>37</sup> *Martin*, 426 F.3d at 73 n.4. The district court mistakenly described Martin as a member of *Candyman* e-group. *Id.*

<sup>38</sup> *Id.* at 74 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)) (emphasis omitted).

<sup>39</sup> *Id.* at 75.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 74.

<sup>42</sup> *Id.* at 75.

<sup>43</sup> *Id.*



joins such a site would more than likely download and possess such material.”<sup>44</sup> The court distinguished the probable cause standard from the standard necessary to establish a prima facie case: “Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the magistrate’s decision. . . . [I]t is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.”<sup>45</sup> The majority found this probability standard satisfied, even though the Affidavit did not specify that Martin downloaded child pornography, because “proof of specific criminal conduct” was not required.<sup>46</sup> Having found that the remaining evidence was sufficient to establish probable cause, the court reasoned that it was not necessary to reach the question of whether Binney’s statements were knowingly or recklessly false.<sup>47</sup> The court upheld Martin’s conviction,<sup>48</sup> but remanded the case for resentencing.<sup>49</sup>

In dissent, Judge Pooler argued that the evidence presented, absent Binney’s false statements, was insufficient to establish probable cause.<sup>50</sup> Under 18 U.S.C. § 2252A,<sup>51</sup> only *visual*

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 74 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)) (internal quotation marks omitted).

<sup>46</sup> *See id.* at 76 (quoting *Gates*, 462 U.S. at 235).

<sup>47</sup> *See id.* at 74.

<sup>48</sup> *See id.* at 78. In upholding the conviction, the court completely disregarded any argument based on First Amendment freedom of association. In fact, the court’s only mention of freedom of association came when it summarily dismissed defendant’s argument: “We believe that our conclusion adequately balances the need for law enforcement to have a certain amount of latitude in conducting criminal investigations with the constitutional guarantees of free association and protection against unlawful searches.” *Id.* at 76. In the majority’s view, the entire forum was devoted to illicit purposes. *See id.* at 74 (stating that there were sufficient facts for the magistrate to conclude that the sole purpose of the e-group was illicit). Because the sole purpose of the e-group was illicit, it can be inferred from mere membership in the e-group that there was a “substantial likelihood of criminal activity.” *See id.* at 76. The same cannot be said of mere membership in an “offensive or disreputable group.” *See id.*

<sup>49</sup> The resentencing was ordered in accordance with *United States v. Booker*, 543 U.S. 220, 245–46 (2005), which determined that the Federal Sentencing Guidelines are advisory, and *United States v. Crosby*, 397 F.3d 103, 117–18 (2d Cir. 2005), which ruled that, under *Booker*, the court would normally remand a defendant’s case for determination by the sentencing judge of whether a materially different sentence would have been imposed had the judge known that the Guidelines were advisory. *See Martin*, 426 F.3d at 77–78.

<sup>50</sup> *See Martin*, 426 F.3d at 79 (Pooler, J., dissenting) (“Agent Binney’s false statements provided the only basis for the inference that there was a fair probability

depictions of children engaged in sexually explicit conduct are unlawful.<sup>52</sup> The dissent noted that the “vast majority” of the *girls12-16* subscribers opted not to receive visual depictions of children engaged in sexually explicit conduct.<sup>53</sup> The dissent also noted that the government failed to provide evidence that Martin downloaded child pornography, and that the corrected Affidavit only supported the inference that he had used the legal, text-based functions of the site—activities that were outside the purview of 18 U.S.C. § 2252A.<sup>54</sup> Finally, the dissent challenged the majority’s characterization of the e-group as having the overriding purpose of trading illegal child pornography,<sup>55</sup> but stated that:

Even assuming arguendo that the *girls12-16* E-group was wholly dedicated to an illegal purpose and that membership in a wholly illegal organization is a proper basis for probable cause, the affidavit is still insufficient . . . because it . . . lack[s] the requisite nexus between Martin and the trading of illegal visual depictions.<sup>56</sup>

The defendant in *Coreas* was a member of the *Candyman* e-group.<sup>57</sup> In that case, a different Second Circuit panel unanimously agreed with Judge Pooler’s reasoning in *Martin*<sup>58</sup> but, nevertheless, being bound by precedent, upheld the conviction of the defendant.<sup>59</sup> The *Coreas* court, supporting

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that all E-group subscribers would possess illegal visual depictions.”).

<sup>51</sup> 18 U.S.C. § 2252A (Supp. 2005).

<sup>52</sup> See *Martin*, 426 F.3d at 78–79 (Pooler, J., dissenting).

<sup>53</sup> See *id.* at 79 n.8 (quoting *United States v. Perez*, 247 F. Supp. 2d 459, 482–83 (S.D.N.Y. 2003)). For the purpose of this discussion, images include any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture.

<sup>54</sup> See *id.* at 80 & n.11.

<sup>55</sup> See *id.* at 80–81.

<sup>56</sup> *Id.* at 81 n.12.

<sup>57</sup> See *United States v. Coreas*, 419 F.3d 151, 152 (2d Cir. 2005).

<sup>58</sup> See *id.* at 159 (“For these reasons, as well as for the many other reasons so well articulated by Judge Pooler in her dissent in *Martin*, we believe *Martin* itself was wrongly decided.”). Prior to the holdings in *Martin* and *Coreas*, some Second Circuit courts had followed a similar line of reasoning and invalidated search warrants supported by Binney’s Affidavit. See *United States v. Kunen*, 323 F. Supp. 2d 390, 401 (E.D.N.Y. 2004); *United States v. Perez*, 247 F. Supp. 2d 459, 481 (S.D.N.Y. 2003); accord *United States v. Strauser*, 247 F. Supp. 2d 1135, 1135–36 (E.D. Mo. 2003).

<sup>59</sup> See *Coreas*, 419 F.3d at 159 (“Nonetheless, since the *Martin* case was heard first, we are compelled, under established rules of this circuit, to affirm *Coreas*’ conviction.”). The *Coreas* court also recognized that upholding the search warrant

Judge Pooler's arguments, noted that of the approximately 500 e-mails received by Binney during his investigation, about 100 e-mails contained content which fell within the prohibitions of 18 U.S.C. § 2252A.<sup>60</sup> In addition, during the period of Binney's investigation, "*more than 85 percent of the Candyman members elected [not] to receive . . . automatic emails.*"<sup>61</sup> Thus, the court explained, any given member was *unlikely* to have received automatic e-mails during the investigation.<sup>62</sup> The court concluded that the government failed to present any specific evidence that Coreas had downloaded child pornography;<sup>63</sup> rather the government relied on evidence of the proclivities of child pornography collectors and attempted to classify Coreas as a collector by showing that he clicked the subscribe button on the website.<sup>64</sup> The court believed that without Binney's false statements, the remaining evidence did not support probable cause.<sup>65</sup> In addition, the court stated that Binney's statements were made with reckless disregard for the truth.<sup>66</sup> The court concluded that the *Martin* rule would "chill the rights of speech and association guaranteed by the First Amendment."<sup>67</sup> It then tried to distinguish *Coreas* from *Martin* because the defendants belonged to different e-groups;<sup>68</sup> however, it later rejected this

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might "chill the rights of speech and association guaranteed by the First Amendment." *Id.* at 156. The court continued:

That Candyman was a forum for a repugnant viewpoint does not alone support an inference of criminal conduct. Coreas broke no laws in joining the group and visiting its website, provided that he did not download any child pornography while there (and there was no allegation that he did). Many of the activities Candyman facilitated, such as members' chatting with each other, are protected by the First Amendment. Where an organization is not so "wholly illegitimate" that membership itself necessarily implies criminal conduct, membership alone cannot provide probable cause.

*Id.* at 156–57 (quoting *United States v. Brown*, 951 F.2d 999, 1003 (9th Cir. 1991)).

<sup>60</sup> *See id.* at 152.

<sup>61</sup> *Id.* at 154. The *Martin* court cited no similar statistics for the *girls12-16* e-group, but because nearly all website hosts can track usage, there is no reason to believe that such statistics would not have been available to the government had it tried to obtain them.

<sup>62</sup> *See id.* at 154.

<sup>63</sup> *See id.* at 153.

<sup>64</sup> *See id.* at 153–54.

<sup>65</sup> *See id.* at 156.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See id.* at 157 ("Arguably *Martin* might be distinguished from the instant case on the ground that the defendant there had joined a different group, *girls12-16*.").

distinction because the *Martin* court found the differences between the websites immaterial.<sup>69</sup> Only two weeks after the decision in *Martin*, despite its complete disagreement with the *Martin* majority, the court upheld Coreas' conviction.<sup>70</sup> Both *Martin* and Coreas filed petitions for rehearing; however, both motions were denied.<sup>71</sup>

This Comment submits that the *Martin* court erroneously refused to suppress the evidence obtained pursuant to the search warrant for Martin's home and computer. Part I describes the general requirements for suppressing evidence obtained pursuant to a faulty search warrant. Part II first defines the phrase "reckless disregard for the truth," then contends that Agent Binney's Affidavit contained recklessly false or misleading material. Next, Part III sets out the requirements for establishing probable cause. It then argues that Agent Binney's statements and omissions were material to the finding of probable cause because membership in an organization that has both legal and illegal purposes is, without more, insufficient to establish probable cause to obtain a search warrant for a suspect's computer and home.<sup>72</sup> Finally, Part IV suggests reasons for *Martin's* misapplication of the probable cause standard and why, as a policy matter, requiring evidence of an individual's wrongdoing is a better option than the rule suggested by the *Martin* majority. Even assuming that the primary purposes of the e-groups were illicit, probable cause was not established by membership in the e-groups without a

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<sup>69</sup> *Id.* Although the *girls12-16* welcome message was more sexually explicit, the *Martin* majority "regarded the Candyman welcome message as explicit enough to warrant an inference of unlawful purpose." *Id.*

<sup>70</sup> *Id.* at 159.

<sup>71</sup> *United States v. Coreas*, 426 F.3d 615, 617 (2d Cir. 2005) (per curiam) [hereinafter *Coreas II*]; *United States v. Martin*, 426 F.3d 83, 89 (2d Cir. 2005) [hereinafter *Martin II*]. Interestingly, in *Martin II*, the Second Circuit stated that "[a]lthough the Candyman welcome message was not before this panel, we need to clarify that we do not view the differences between the two welcome messages as 'immaterial.' To the contrary, the *girls12-16* welcome message was an integral component of our probable cause determination." *Id.* at 86. The *Coreas II* court still found no distinction. *See Coreas II*, 426 F.3d at 616.

<sup>72</sup> For purposes of illustration, this Comment will draw on the similar facts of other cases related to Operation Candyman and argue that the majority rule applied in those cases is incorrect. Because information regarding the *Candyman* e-group is most accessible from the court records, many of the statistics cited are in reference to *Candyman* and *Candyman* users, however the arguments apply to both websites and their users. *See supra* note 20.

showing that the individuals had engaged in some illegal activity, and while the information establishing the individuals' participation, or lack thereof, was available to the government.

# I. SUPPRESSING EVIDENCE OBTAINED PURSUANT TO A SEARCH WARRANT

In *Franks v. Delaware*,<sup>73</sup> the Supreme Court stated for the first time that, after the issuance of a search warrant, a criminal defendant has a Fourteenth Amendment right to challenge the truthfulness of statements made in an affidavit supporting the warrant.<sup>74</sup> *Franks* involved a defendant who was accused of committing rape, kidnapping, and burglary.<sup>75</sup> The victim, Mrs. Cynthia Bailey, told the police during her statement that the defendant confronted her with a knife in her home and forced her to engage in sexual relations.<sup>76</sup> Among other things, she described the assailant's clothing: a white thermal undershirt, black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap.<sup>77</sup> Two detectives, suspecting Franks as the offender and desiring to search his apartment, later submitted a sworn affidavit in support of a search warrant application to the Justice of the Peace in Dover, Delaware.<sup>78</sup> The affidavit stated that the affiants had spoken directly with Wesley Lucas and James D. Morrison, two people from Franks' place of employment, and that these coworkers had jointly described Franks' "normal dress" as consisting of a white knit thermal undershirt, a brown leather jacket, and a dark green knit cap.<sup>79</sup> At trial, however, defendant's counsel sought to call Lucas and Morrison to testify that neither of them had been personally interviewed by the affiants and that, while they had talked to another police officer, the information given to them by that officer was somewhat different from what was included in the affidavit.<sup>80</sup> Defense counsel asserted that the misrepresentations were material to the finding of probable cause

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<sup>73</sup> 438 U.S. 154 (1978).

<sup>74</sup> *Id.* at 155-56.

<sup>75</sup> *Id.* at 156.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 157.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 158.

and were included in bad faith.<sup>81</sup> The trial judge refused to allow the defendant to call Lucas and Morrison for the purpose of attacking the veracity of the statements in the affidavit and the defendant was convicted on all counts.<sup>82</sup> The conviction was subsequently affirmed by the Delaware Supreme Court and the United States Supreme Court granted certiorari.<sup>83</sup>

On appeal, the Supreme Court reversed Franks' conviction. The Court held that while an affidavit supporting a search warrant is presumed to be valid:<sup>84</sup>

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment *requires* that a hearing be held at the defendant's request.<sup>85</sup>

If, at such hearing, the defendant proves by a preponderance of the evidence that a false statement was included in a search warrant affidavit knowingly and intentionally, or with reckless disregard for its truth, *and* the remaining material in the affidavit is insufficient to support a finding of probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."<sup>86</sup> Because Franks had preliminarily established that the false statements were either knowingly or recklessly included in the warrant affidavit, he was entitled to present evidence as to their falsity at the hearing.<sup>87</sup> Thus, the Court reversed and remanded the case to the Supreme Court of Delaware.<sup>88</sup>

The Second Circuit has since clarified the *Franks* standard. Not every statement in the supporting affidavit must be true for it to survive the defendant's suppression motion.<sup>89</sup> If the false

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 160.

<sup>83</sup> *Id.* at 160–61.

<sup>84</sup> *Id.* at 171.

<sup>85</sup> *Id.* at 155–56 (emphasis added).

<sup>86</sup> *Id.* at 156.

<sup>87</sup> *Id.* at 171.

<sup>88</sup> *Id.* at 172.

<sup>89</sup> *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000) (citing *United States v. Trzaska*, 111 F.3d 1019, 1027 (2d Cir. 1997)). The government conceded that the search warrant contained false information and that it was not true that e-

statement was unnecessary to the magistrate's finding of probable cause, suppression of the evidence is inappropriate.<sup>90</sup> Omissions from the affidavit are governed by the same standard.<sup>91</sup> Thus, "material omissions made with an intent to mislead or with a reckless disregard for the truth also must be corrected before the court considers the sufficiency of a search warrant affidavit."<sup>92</sup> The question of whether the untainted portions of the affidavit support probable cause is a legal one; hence, the Circuit Court must review the decision *de novo*.<sup>93</sup>

## II. BINNEY'S STATEMENTS WERE INCLUDED WITH RECKLESS DISREGARD FOR THE TRUTH

### A. *What Does It Mean To Recklessly Include or Omit Material Evidence Without Regard for the Truth?*

After *Franks*,<sup>94</sup> the definition of recklessness in the Fourth Amendment context was at first largely undefined.<sup>95</sup> This lack of clarity came about because "the Supreme Court in *Franks* gave no guidance concerning what constitutes a reckless disregard for the truth in Fourth Amendment cases, except to state that 'negligence or innocent mistake [is] insufficient.'"<sup>96</sup> As a result, several circuits have analogized from the First Amendment libel standard.<sup>97</sup> To prove that the affiant recklessly disregarded the

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group members received all e-mails automatically. *United States v. Perez*, 247 F. Supp. 2d 459, 472 (S.D.N.Y. 2003).

<sup>90</sup> See *Canfield*, 212 F.3d at 717–18; *Franks*, 438 U.S. at 172 n.8 (reasoning that if what is left is sufficient to establish probable cause, the inaccuracies are irrelevant).

<sup>91</sup> *Canfield*, 212 F.3d at 718 (citing *United States v. Ferguson*, 758 F.2d 843, 848 (2d Cir. 1985)).

<sup>92</sup> *Perez*, 247 F. Supp. 2d at 473 (citing *Wilson v. Russo*, 212 F.3d 781, 787–88 (3d Cir. 2000)).

<sup>93</sup> *United States v. Martin*, 426 F.3d 68, 73–74 (2d Cir. 2005) (citing *Canfield*, 212 F.3d at 718).

<sup>94</sup> 438 U.S. 154 (1978); see discussion *supra* Part I.

<sup>95</sup> *Perez*, 247 F. Supp. 2d at 473 ("Little precedent exists to define 'reckless disregard' in the search warrant context.").

<sup>96</sup> *United States v. Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979) (quoting *Franks*, 438 U.S. at 171).

<sup>97</sup> See, e.g., *United States v. Coreas*, 419 F.3d 151, 155–56 (2d Cir. 2005); *United States v. Ranney*, 298 F.3d 74, 78 (1st Cir. 2002); *United States v. Whitley*, 249 F.3d 614, 621 (7th Cir. 2001); *United States v. Schmitz*, 181 F.3d 981, 986–87 (8th Cir. 1999); *United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998); *Beard v. City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994); *Davis*, 617 F.2d at 694.

truth, the defendant must show “that the affiant ‘in fact entertained serious doubts as to the truth’ of the allegations.”<sup>98</sup> The defendant may meet this burden “not only by showing [the affiant’s] actual deliberation but also by demonstrating”<sup>99</sup> that “‘they had obvious reasons to doubt [the statements] veracity.’”<sup>100</sup> Intentional or reckless *omissions* of material information may also serve as the basis for a *Franks* challenge.<sup>101</sup> Where the omission of information is involved, “[r]ecklessness may be inferred [if] the omitted information was clearly critical to the probable cause determination.”<sup>102</sup>

*B. The FBI Recklessly Included Binney’s Statements and Recklessly Omitted Other Material Evidence*

A majority of the courts in the *Candyman* cases have declined to reach the issue of whether the statements in Agent Binney’s Affidavit were knowingly or recklessly false because they believe that the warrants were supported by probable cause, even absent consideration of the false statements.<sup>103</sup> In the few cases that have answered the question, courts have split.<sup>104</sup>

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<sup>98</sup> *Ranney*, 298 F.3d at 78 (quoting *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984) (agreeing with *Davis*, 617 F.2d at 694)).

<sup>99</sup> *Davis*, 617 F.2d at 694.

<sup>100</sup> *Coreas*, 419 F.3d at 155 (quoting *Perez*, 247 F. Supp. 2d at 479).

<sup>101</sup> *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991) (citing *United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989)).

<sup>102</sup> *Id.* (citation and internal quotation marks omitted).

<sup>103</sup> See, e.g., *United States v. Shields*, 458 F.3d 269, 277 (3d Cir. 2006); *United States v. Martin*, 426 F.3d 68, 74 (2d Cir. 2005); *United States v. Froman*, 355 F.3d 882, 884, 888 (5th Cir. 2004) (“Because the affidavit supports a finding of probable cause even without the alleged false statements, we affirm the district court’s denial of Froman’s suppression motion.”); see also *United States v. Bailey*, 272 F. Supp. 2d 822, 824 (D. Neb. 2003) (stating that because of Yahoo’s irresponsible behavior, it was impossible to determine whether the FBI had intentionally or recklessly included false and incomplete information in the affidavit); *United States v. Fantauzzi*, 260 F. Supp. 2d 561, 566 (E.D.N.Y. 2003) (refusing to reach the question on other grounds).

<sup>104</sup> See, e.g., *Coreas*, 419 F.3d at 152–53 (finding that the government made the statements with reckless disregard for the truth and adopting the findings of *United States v. Strauser*, 247 F. Supp. 2d 1135, 1143 (E.D. Mo. 2003), and *Perez*, 247 F. Supp. 2d at 480); *United States v. Kunen*, 323 F. Supp. 2d 390, 395–96 (E.D.N.Y. 2004); *Strauser*, 247 F. Supp. 2d at 1143; *Perez*, 247 F. Supp. 2d at 480. But see *United States v. Bailey* 272 F. Supp. 2d 822, 837 (D. Neb. 2003) (assuming, for the purposes of defendant’s motion to suppress the evidence, that the statements were made recklessly, but casting serious doubt on that assumption and later finding that the warrant was sufficiently supported by probable cause).



However, only the courts in *United States v. Strauser*<sup>105</sup> and *United States v. Perez*<sup>106</sup> conducted full evidentiary hearings, and both courts found that the FBI acted with reckless disregard for the truth.<sup>107</sup>

In the course of Agent Binney's investigation, he joined *Candyman* and seven other e-groups.<sup>108</sup> Binney testified that he had joined *Candyman* by copying the e-mail address listed under "Subscribe" on the website homepage, pasting that address into an e-mail, and sending the e-mail.<sup>109</sup> He also testified that he did *not* register by clicking the "subscribe" button on the website, nor did he explore the other buttons on the page.<sup>110</sup> Thus, the government argued, at the time of the issuance of the search warrants, the FBI did not act recklessly by including the statements that all e-group users received e-mails automatically.<sup>111</sup> Nevertheless, the evidence shows that Agent Binney plainly joined *Candyman* through web registration and that the government recklessly disregarded the evidence that other members could have chosen not to receive e-mails automatically.

On February 9, 2001, in response to a subpoena, Yahoo released a set of documents to the FBI.<sup>112</sup> One of the documents indicated that there were e-mail options for users.<sup>113</sup> On January 18, 2002, Yahoo produced additional documents and a computer disk.<sup>114</sup> In a one-page group profile of the *Candyman* e-group, a category called "number of subscribers" indicated the following data: of the total 3,213 users, 473 users chose to receive e-mail messages while 2,740 users chose to receive no e-mail at all.<sup>115</sup> On January 24, 2002, Agent Sheldon met with

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<sup>105</sup> 247 F. Supp. 2d 1135 (E.D. Mo. 2003).

<sup>106</sup> 247 F. Supp. 2d 459 (S.D.N.Y. 2003).

<sup>107</sup> *Strauser*, 247 F. Supp. 2d at 1143; *Perez*, 247 F. Supp. 2d at 480.

<sup>108</sup> *Strauser*, 247 F. Supp. 2d at 1139-40.

<sup>109</sup> *Id.* at 1139.

<sup>110</sup> *Id.*

<sup>111</sup> *Perez*, 247 F. Supp. 2d at 480 ("The Government argues that, at worst, the agents made the false statement negligently, and that Perez is merely complaining that the agents should have done a more thorough investigation, when the law is clear that a failure to fully investigate is not sufficient to show reckless disregard."); see *Strauser*, 247 F. Supp. 2d at 1142 ("The government correctly points out that *Franks* issues cannot be viewed with the benefit of hindsight.").

<sup>112</sup> *Perez*, 247 F. Supp. 2d at 467.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 467-68.

<sup>115</sup> *Id.* at 468, 479.

Yahoo representatives.<sup>116</sup> When asked if there were e-mail options for the e-groups, the representatives told Agent Sheldon that they were unsure and would get back to her.<sup>117</sup> Approximately two months later, Sheldon interviewed Mark Bates, the former moderator of the Candyman e-group.<sup>118</sup> Bates told Sheldon that e-group members who registered by e-mail were automatically added to the e-mail list, while those who registered on the *Candyman* website could opt out of this feature;<sup>119</sup> Sheldon apparently did not believe Bates.<sup>120</sup> Finally, logs from Yahoo showed that all web subscribers were presented with e-mail delivery options.<sup>121</sup> One Yahoo official testified that, according to Yahoo's source code log, Binney had clearly subscribed via the website.<sup>122</sup> Therefore, not only was Binney given an e-mail delivery option when he registered on *Candyman*, but he also was given this same choice on numerous other occasions.<sup>123</sup> In fact, Binney had signed up for all of the other seven e-groups via the web.<sup>124</sup> Although Binney testified that normally he would have printed and saved any e-mails that he sent during an operation like this, he had no record of any e-mails that he sent to subscribe to the *Candyman* e-group, nor did he prepare any written record of sending such an e-mail.<sup>125</sup> Despite the evidence, Sheldon based the draft affidavit on

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<sup>116</sup> *Id.* at 479.

<sup>117</sup> *Id.* at 468 (citation omitted).

<sup>118</sup> *Id.*

<sup>119</sup> See *United States v. Bailey*, 272 F. Supp. 2d 822, 833 (D. Neb. 2003); see also *Perez*, 247 F. Supp. 2d at 465, 468.

<sup>120</sup> See *Bailey*, 272 F. Supp. 2d at 833. Apparently Sheldon did not credit Bates' statements because he "was the subject of a significant criminal investigation; the moderator of not only the Candyman E-group, but also the Candyman2, Candyman3, and Candyman4 E-groups; and was a member of 170 other E-groups. . . . Mr. Bates' credibility and memory concerning the delivery options associated specifically with the Candyman E-group was suspect." *Id.*

<sup>121</sup> See *id.*

<sup>122</sup> *Perez*, 247 F. Supp. 2d at 466. A log was only generated when a subscriber joined via the web. *Id.*

<sup>123</sup> *Id.* at 467. The court found that Binney was given the e-mail options choice on six of the other seven websites because Yahoo log data was unavailable for one of the e-groups. *Id.*

<sup>124</sup> *United States v. Strauser*, 247 F. Supp. 2d 1135, 1139-40 (E.D. Mo. 2003). The record reflected that Binney attempted to sign up for one e-group via e-mail, however his e-mail was bounced back. He then subscribed to that group via the web. *Id.* at 1140.

<sup>125</sup> *Perez*, 247 F. Supp. 2d at 466.

Binney's original statements and indicated that, upon joining, all e-group members automatically received e-mails.<sup>126</sup>

Taking all of the evidence together, the government's representations that all e-group users automatically received e-mail was obviously not the result of an innocent mistake or negligence. Binney stated that he assumed all members went through the same process as he did; therefore, he was unaware that there were e-mail options.<sup>127</sup> But Binney also testified that he had explored the *Candyman* website after he subscribed.<sup>128</sup> As the court in *Perez* stated: "It is hard to imagine that [Binney] would not have clicked on the 'subscribe' button at some point. . . . One would expect that an FBI agent acting in an undercover capacity would have . . . explored thoroughly the process by which members came to receive e-mails, given the significance of the issue . . . ."<sup>129</sup> In addition, Agent Sheldon must have entertained serious doubts as to the truth of the statements in the Affidavit.<sup>130</sup> Not until July 2002, however, did the government first notify the defendants that some of the statements in the Affidavit might have been incorrect.<sup>131</sup> The government knew that "if someone . . . did not get e-mails, then there would be no real basis to prosecute such a person[.]"<sup>132</sup> Nevertheless, the government failed to disclose such information despite its knowledge that this information would have been critical to the magistrate's probable cause determination.

### III. BINNEY'S STATEMENTS AND OMISSIONS WERE MATERIAL TO A FINDING OF PROBABLE CAUSE

#### A. *Establishing Probable Cause for Search Warrants*

Probable cause for the issuance of a search warrant exists when known facts and circumstances are sufficient to warrant a person of reasonable prudence to believe that contraband or

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<sup>126</sup> See *id.* at 468.

<sup>127</sup> *Id.* at 470.

<sup>128</sup> *Id.* at 467.

<sup>129</sup> *Id.*

<sup>130</sup> "Even though [Sheldon] did not hear back from the Yahoo representatives after the January 24, 2002 meeting, and even though she knew this was an 'open question,' she sent out the draft search warrant with the representation that all members automatically received all e-mails." *Id.* at 468.

<sup>131</sup> *United States v. Coreas*, 419 F.3d 151, 154 (2d Cir. 2005).

<sup>132</sup> *Perez*, 247 F. Supp. 2d at 480.

evidence is located in a particular place<sup>133</sup> or that an offense has been or is being committed.<sup>134</sup> The very name implies that the courts must deal with probabilities.<sup>135</sup> It is not a technical determination, but rather something that must be determined from the factual and practical considerations of everyday life on which reasonable and prudent individuals, not legal technicians, act.<sup>136</sup> Jurors as fact finders, law enforcement officers, and magistrate judges may formulate common sense conclusions about human behavior.<sup>137</sup> The standard for probable cause, unlike determinations of guilt or liability, is a relaxed one<sup>138</sup> that requires “‘less than evidence which would justify . . . conviction,’ but ‘more than bare suspicion.’”<sup>139</sup> The magistrate must consider the totality of the facts and circumstances before him;<sup>140</sup> thus, even if an innocent explanation is consistent with the facts alleged, probable cause is not automatically negated.<sup>141</sup>

The totality of the circumstances must also present “particularized suspicion.”<sup>142</sup> In other words, the “assessment of the whole picture must . . . raise a suspicion that the particular

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<sup>133</sup> See *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

<sup>134</sup> *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) (per curiam).

<sup>135</sup> *Gates*, 462 U.S. at 231 (citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

<sup>136</sup> See *id.* (citing *Brinegar*, 338 U.S. at 175).

<sup>137</sup> See *id.* at 231–32, 238 (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)). The inquiry is essentially the same, regardless of whether it is made by the magistrate upon application for a warrant or the law enforcement officer before searching without a warrant, because the existence of probable cause is a common-sense determination. See WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.1 (4th ed. 2004), for a discussion of the similarities and differences. But where possible, warrants are preferred. *United States v. Ventresca*, 380 U.S. 102, 105–06 (1965) (citations omitted). This preference stems from the Court’s belief that Fourth Amendment protections are best preserved when the “neutral and detached magistrate” judge rather than the “zealous officers . . . engaged in . . . ferreting out crime” makes the determination. *Id.* at 106 (quoting *Johnson v. United States*, 333 U.S. 10, 13–14 (1948)). Thus, “in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.” *Id.*

<sup>138</sup> See *United States v. Martin*, 426 F.3d 68, 76 (2d Cir. 2005).

<sup>139</sup> *Id.* (quoting *Brinegar*, 338 U.S. at 175–76).

<sup>140</sup> See *Gates*, 462 U.S. at 238. Amongst other considerations, the magistrate may look to “various objective observations, [including] information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers.” *United States v. Cortez*, 449 U.S. 411, 418 (1981).

<sup>141</sup> See *Martin*, 426 U.S. at 77 (quoting *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985)).

<sup>142</sup> *Gates*, 462 U.S. at 231 (citing *Cortez*, 449 U.S. at 418).

individual . . . is engaged in wrongdoing.”<sup>143</sup> In fact, the “demand for specificity in the information upon which police action is predicated is *the central teaching of [the Supreme] Court’s Fourth Amendment jurisprudence.*”<sup>144</sup> Generally, membership in an organization alone does not establish this particularized suspicion.<sup>145</sup> The First Amendment restricts the ability of the State to impose a “blanket prohibition of association with a group having both legal and illegal aims.”<sup>146</sup> Indeed such a blanket prohibition would pose “‘a real danger that legitimate political expression or association would be impaired . . . .’”<sup>147</sup> To impose liability, therefore, the State must show that the defendant specifically intended to accomplish the goals of the organization.<sup>148</sup> Another rule would allow punishment of the individual who adheres to the organization’s “lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.”<sup>149</sup> The State may not “broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>150</sup>

Thus, in *United States v. Rubio*,<sup>151</sup> the Court of Appeals for the Ninth Circuit held that “proof of mere membership in the Hells Angels Motorcycle Club, without a link to actual criminal activity, was insufficient to support a finding of probable cause.”<sup>152</sup> Establishing probable cause through membership

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<sup>143</sup> *Cortez*, 449 U.S. at 418.

<sup>144</sup> *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968)); see *Brown v. Texas*, 443 U.S. 47, 51–52 (1979) (“[W]e have required the officers to have a reasonable suspicion, based on objective facts, that the *individual* is involved in criminal activity. . . . The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.”) (emphasis added).

<sup>145</sup> See *United States v. Brown*, 951 F.2d 999, 1002–03 (9th Cir. 1991) (citing *United States v. Rubio*, 727 F.2d 786, 790, 793 (9th Cir. 1984)).

<sup>146</sup> *NAACP v. Claiborne*, 458 U.S. 886, 919 (1982) (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)).

<sup>147</sup> *United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004) (quoting *Scales*, 367 U.S. at 229) *abrogated on other grounds by* *United States v. Booker*, 543 U.S. 220, 234 (2005).

<sup>148</sup> See *Claiborne*, 458 U.S. at 919.

<sup>149</sup> *Id.* (quoting *Noto v. United States*, 367 U.S. 290, 299–300 (1961)).

<sup>150</sup> *Id.* at 920 (internal quotation marks omitted).

<sup>151</sup> 727 F.2d 786 (9th Cir. 1984).

<sup>152</sup> *United States v. Brown*, 951 F.2d 999, 1002 (9th Cir. 1991) (citing *Rubio*, 727 F.2d at 790, 793). It is interesting to note the court’s protection of the First Amendment rights of the Hells Angels Motorcycle Club, an “organization proved to be involved in numerous types of criminal activity on a nationwide basis with a

would only be appropriate “[i]f such a large portion of the subject organization’s activities [were] illegitimate so that the enterprise could be considered, in effect, wholly illegitimate . . . .”<sup>153</sup> Because the court did not find that a large portion of Hells Angels’ activities were illegitimate, membership alone could not be used to establish probable cause.<sup>154</sup> In *United States v. Brown*,<sup>155</sup> the Ninth Circuit reaffirmed its holding in *Rubio*. In that case, the defendants were law enforcement officers assigned to a narcotics and money laundering detection unit known as Majors 2.<sup>156</sup> During a sting operation, it was determined that several members of Majors 2 were engaged in stealing money and other items during narcotics raids.<sup>157</sup> Subsequently, federal agents sought warrants to search the homes of all Majors 2 members.<sup>158</sup> The supporting affidavits stated that the defendants were members of Majors 2 and characterized Majors 2 as a wholly illegitimate operation, but they did not allege that the defendants either stole money themselves or witnessed the stealing by other members.<sup>159</sup> Pursuant to the warrants, federal officials searched the homes of the defendants and found large sums of money, including cash used in the sting.<sup>160</sup> The defendants were convicted but, on appeal, the Ninth Circuit rejected the government’s characterization of the organization as wholly illegitimate.<sup>161</sup> The court held that, even if there was a widespread conspiracy, the warrants had failed to establish probable cause to believe that the defendants were involved.<sup>162</sup>

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propensity for violence.” *United States v. Pasciuti*, 803 F. Supp. 499, 513 (D. N.H. 1992). The Ku Klux Klan is also entitled to First Amendment protection, even though it is an organization dedicated to furthering the “ignoble goal of white supremacy,” *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1429 (D. Conn. 1985), through the use of “unlawful intimidation and violence.” *Gremillion v. NAACP*, 181 F. Supp. 37, 39 (E.D. La. 1960).

<sup>153</sup> *Brown*, 951 F.2d at 1003 (quoting *Rubio*, 727 F.2d at 793).

<sup>154</sup> *Rubio*, 727 F.2d at 795 (“The record is replete with instances of individual criminal behavior by members and associates of the Club, but we find no connection between such individual activity and the conduct of the affairs of the enterprise as a whole.”).

<sup>155</sup> *United States v. Brown*, 951 F.2d 999 (9th Cir. 1991).

<sup>156</sup> *Id.* at 1000.

<sup>157</sup> *Id.* at 1001.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1003.

<sup>160</sup> *Id.* at 1002.

<sup>161</sup> *Id.* at 1003.

<sup>162</sup> *Id.*

*B. Binney's False Statements and Omissions Were Material To Finding Probable Cause: Membership Alone Did Not Establish Probable Cause That Members Were Engaged in Illegal Conduct*

Agent Binney's statements likely established circumstances that were sufficient to warrant individuals of reasonable prudence to believe that *Candyman* and *girls12-16* members were in possession of child pornography.<sup>163</sup> Without these false statements, however, the probability that members were in possession of child pornography was greatly reduced. Moreover, without Binney's false statements, there was no particularized suspicion that Martin or Coreas were engaged in wrongdoing;<sup>164</sup> such conclusions are borne out by the results of the searches.<sup>165</sup> The *Coreas* court noted that "[t]he record of this appeal is silent as to what resulted from most of the other 23 searches, but public records of the Eastern District of New York indicate that many of the persons whose residences were searched were never charged with any crime."<sup>166</sup> Thus, these results demonstrate that, based on membership evidence alone, the e-groups' users were actually unlikely to be in possession of illicit material.<sup>167</sup>

According to Agent Binney's affidavit, after receiving confirmation of one's registration, a member of the *Candyman* website could "download . . . approximately 100 images and video clips of prepubescent minors engaged in sexual activities, the genitalia of nude minors, and child erotica. . . . Of these, the majority of the images and video clips fell into the first category."<sup>168</sup> But members could have participated in other areas

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<sup>163</sup> See *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (probable cause findings are made according to a "reasonable and prudent [person]" standard).

<sup>164</sup> See *United States v. Coreas*, 419 F.3d 151, 153 (2d Cir. 2005); *United States v. Martin*, 426 F.3d 68, 80 n.11 (2d Cir. 2005) (Pooler, J., dissenting).

<sup>165</sup> After conducting searches during Operation *Candyman*, the FBI found that many members of the *girls12-16* and *Candyman* e-groups were in possession of child pornography. See *supra* note 12 and accompanying text. The overwhelming number of searches, however, yielded no illicit material. See *infra* notes 166–67 and accompanying text.

<sup>166</sup> *Coreas*, 419 F.3d at 154 n.2.

<sup>167</sup> *Id.* at 154. According to another FBI agent's affidavit, the *Candyman* e-group alone had 3,397 members at the time of Agent Binney's investigation. *United States v. Perez*, 247 F. Supp. 2d 459, 462 (S.D.N.Y. 2003). There may have been as many as 6,300 subscribers during its full time of operation. *Id.* at 465. Some individuals must have subscribed and then later unsubscribed.

<sup>168</sup> *Perez*, 247 F. Supp. at 462 (citation and internal quotation marks omitted).

of the e-groups that did not contain images at all.<sup>169</sup> Trading and downloading images<sup>170</sup> were two of the several activities in which members of the e-groups could engage; *Candyman* and *girls12-16* members could “post images and videos for other members to download[,] . . . answer survey questions[,] . . . post links to other websites[,] and . . . engage in ‘real time conversations with each other.’”<sup>171</sup> But even users who traded and downloaded images were not necessarily downloading child pornography. Child pornography, as defined by 18 U.S.C. § 2256, includes any “visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,” of “a minor engaging in sexually explicit conduct.”<sup>172</sup> The acts of trading or possessing these visual depictions are criminal offenses under 18 U.S.C. § 2252A.<sup>173</sup> Nonetheless, the statute “does *not* criminalize . . . the trading of visual depictions of children that are not sexually explicit but are ‘sexually arousing to a given individual’ (referred to in the affidavit as ‘child erotica’).”<sup>174</sup> In addition, § 2252A does not criminalize “the trading of textual depictions of any kind,”<sup>175</sup> even if the text vividly describes children engaged in sexually explicit activities.

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<sup>169</sup> The “Chat” and “Poll” sections of the site were only text-based, while the “Links” section provided web-links to other sites where images could be found. *Id.* at 464.

<sup>170</sup> For the purpose of this discussion, images include any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture.

<sup>171</sup> *Perez*, 247 F. Supp. 2d at 462 (citation omitted).

<sup>172</sup> 18 U.S.C. § 2256(8) (Supp. 2005). The statute provides in relevant part:

(8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

*Id.*

<sup>173</sup> 18 U.S.C. § 2252A (Supp. 2005).

<sup>174</sup> *United States v. Martin*, 426 F.3d 68, 79 (2d Cir. 2005) (Pooler, J., dissenting).

<sup>175</sup> *Id.*



The e-mails distributed during Binney's investigation contained a mixture of images and text, but during Binney's investigation, 85 percent of the *Candyman* members chose not to receive automatic e-mails from the group.<sup>176</sup> Moreover, even if a member decided to receive e-mails, of the approximately 500 e-mails received by Agent Binney, over 400 did *not* contain illegal material.<sup>177</sup> Therefore, according to the government's evidence, any member who did not participate in the file posting area was actually more likely to have engaged in *legal* activities. Such evidence, without considering Binney's false statements, cannot establish probable cause by itself. Thus, without more than evidence of the defendants' membership, the *Martin* and *Coreas* courts should have invalidated the warrants used to search the defendants' homes, excluded the evidence obtained pursuant to those warrants, and overturned the defendants' convictions.

#### IV. IMPLICATIONS OF THE *MARTIN* DECISION: PARTICULARIZED EVIDENCE SHOULD BE REQUIRED TO ESTABLISH PROBABLE CAUSE

##### A. *Why Did the Court in Martin Reach Its Decision and Why Do Most Courts Agree?*

Most courts have agreed with *Martin's* reasoning.<sup>178</sup> Similar holdings are likely the result of society's disgust with child pornographers who are inherently linked to sexual predators.<sup>179</sup>

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<sup>176</sup> United States v. Coreas, 419 F.3d 151, 154 (2d Cir. 2005).

<sup>177</sup> See United States v. Perez, 247 F. Supp. 2d 459, 464–65 (S.D.N.Y. 2003); see also *Martin II*, 426 F.3d 83, 90 (2d Cir. 2005) (Pooler, J., dissenting) ("In fact, child erotica constituted almost eighty five percent of the pictures e-mailed to Agent Binney while he was a member of the group, making it far more prevalent on the site than illegal child pornography."). The *Perez* court pointed out that there was a discrepancy over the number of e-mails that contained file attachments. *Perez*, 247 F. Supp. 2d at 464, 465 n.3. According to the original affidavits used to obtain the search warrants, approximately 100 e-mails contained child pornography. During Binney's testimony, however, he stated that a little over 100 e-mails contained either child erotica or child pornography; most of the 100 contained child erotica, but a "substantial number" contained child pornography. *Id.* at 464. Because some of the statements in the affidavits were not based on personal knowledge, the *Perez* court accepted Binney's testimony as containing the more accurate estimations. *Id.* at 465 n.3.

<sup>178</sup> See *supra* notes 34–35 and accompanying text.

<sup>179</sup> See Ethel Quayle & Max Taylor, *Model of Problematic Internet Use in People with a Sexual Interest in Children*, 6 CYBERPSYCHOLOGY & BEHAV. 93, 94 (2003) (classifying those who download child pornography on the internet as a new category

Pedophiles particularly concern society because their crimes severely impact children and because they show high recidivism rates.<sup>180</sup> While all children do not react in the same way to sexual abuse, therapists agree that some of the most common symptoms experienced by child victims include sleeping and eating disturbances, feelings of anger, withdrawal, guilt, fear, and anxiousness.<sup>181</sup> Other victims experience symptoms similar to those of Post-Traumatic Stress Disorder, sometimes having flashbacks and recurrent dreams about the events.<sup>182</sup> Still others become phobic about sexual intimacy altogether.<sup>183</sup> Yet the most troubling and consistent finding is that many victims later become abusers themselves.<sup>184</sup> Perhaps it is because of the horrific nature of their crimes that much of society takes notice when the government cracks down on these criminals.

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of sexual offender, but noting that there may have been no contact with a victim); Seper, *supra* note 12, at A03 ("Operation Candyman, involved all the bureau's 56 field offices, and that of the 40 suspects already in custody, 27 admitted to molesting 36 children.") (internal quotation marks omitted). Although those who download child pornography do not necessarily have any contact with the child victim, clearly the people forcing the children into posing for sexually explicit material do have contact.

<sup>180</sup> See U.S. DEPT OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1-2, 13 (2003), <http://www.ojp.usdoj.gov/bjs/abstract/rsorp94.htm> (tracking 9,691 male sex offenders released from 15 state prisons in 1994 and finding that, within the first 3 years following their release, 43% (4,163 of the 9,691) were rearrested for at least 1 new crime, 24% (2,326 of the 9,691) were reconvicted for any type of crime and 11.2% (1,085 of the 9,691) were returned to prison with another sentence). In addition, the report noted that the true extent to which sex offender's recidivate is difficult to determine because many crimes do not result in arrest. *Id.* at 6. Victims of crimes committed by family members and in nonpublic places are less likely to report the abuse. *Id.*; see also Joyce R. Lombardi, *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 That Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. BALT. L. REV. 103, 120 (2004) (noting that studies consistently show that many convicted child molesters have each committed numerous, even hundreds, of sex offenses that go unreported).

<sup>181</sup> Alfie Kohn, *Shattered Innocence: Childhood Sexual Abuse Is Yielding Its Dark Secrets to the Cold Light of Research*, 21 PSYCHOL. TODAY 54, 54 (1987).

<sup>182</sup> *Id.* at 2.

<sup>183</sup> *Id.*

<sup>184</sup> See Carol Veneziano, Louis Veneziano & Scott LeGrand, *The Relationship Between Adolescent Sex Offender Behaviors and Victim Characteristics with Prior Victimization*, 15 J. INTERPERSONAL VIOLENCE 363, 364 (2000) ("Prior sexual victimization of sex offenders has been a consistent finding across the adult and juvenile literature despite considerable differences in sample selection and data collection.").

Judges, while isolated from society in some sense, cannot be immune to these social concerns, nor can they, as humans, be completely unaffected by emotion in these cases. The courts in the *Candyman* cases faced a difficult choice: suppress the evidence and reverse the convictions of defendants, or adapt the "plastic concept"<sup>185</sup> of probable cause to allow the search of the homes of defendants that we now know were in possession of child pornography. Making this choice might have been even more difficult in light of Yahoo's lack of cooperation during the entire investigation, making it harder for the government to collect the necessary evidence.<sup>186</sup> Given these circumstances, a court might understandably err on the side of the government. Unfortunately, the rules set out in *Martin* and *Coreas* extend far beyond the child pornography context.

### B. Policy Requires a Different Standard

The *Martin* court was correct when it asserted that it is "‘common sense’ that one who ‘voluntarily joins’ a child-pornography group and ‘remains a member of the group . . . without canceling his subscription . . . would download such pornography from the website and have it in his possession.’"<sup>187</sup> Indeed, "[k]nowingly becoming a computer subscriber to a specialized internet site that frequently, obviously, unquestionably and sometimes automatically distributes electronic images of child pornography to other computer subscribers" makes it more likely that the suspect is downloading child pornography.<sup>188</sup> This should not, however, be the end of the inquiry.

It may be common sense that an individual who knowingly joins the Communist Party and associates with comrades who

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<sup>185</sup> *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) ("It is 'a plastic concept' whose existence depends on the facts and circumstances of the particular case.") (quoting *Bailey v. United States*, 389 F.2d 305, 308 (D.C. Cir. 1967)).

<sup>186</sup> During the investigation, Binney "informally asked Yahoo! for information, but encountered significant resistance." *United States v. Bailey*, 272 F. Supp. 2d 822, 828 (D. Neb. 2003). He was also told that "he would never speak to a technical representative." *Id.* (internal quotation marks omitted). Although a grand jury subpoena stated, "PLEASE DO NOT SHUT DOWN THE SITE/ADDRESS OR DENY ACCESS UNTIL REQUESTED TO DO SO BY THE INVESTIGATING AGENT[.]" Yahoo shut down the site approximately two weeks later. *Id.*

<sup>187</sup> *United States v. Martin*, 426 F.3d 68, 75 (2d Cir. 2005) (quotation marks omitted) (quoting *United States v. Froman*, 355 F.3d 882, 890–91 (5th Cir. 2004)).

<sup>188</sup> *Id.* at 75–76 (quoting *Bailey*, 272 F. Supp. 2d at 824–25).

advocate the violent overthrow of the government is, himself, more likely than others to attempt to overthrow the government.<sup>189</sup> Members of the Hell's Angels motorcycle club may be more likely than the average citizen to possess contraband.<sup>190</sup> An individual standing in an alley in an area frequented by drug users may be more likely to possess drugs.<sup>191</sup> A tavern patron may possess heroine if he associates with the bartender, who himself regularly possesses heroin.<sup>192</sup> Indeed, a *former* member of an internet e-group that distributes child pornography is more likely to possess child pornography than the ordinary internet user.<sup>193</sup> But while these presumptions may be "common sense,"<sup>194</sup> they seem to be at odds with Fourth Amendment jurisprudence. Generalized findings about an organization that conducts both lawful—albeit reprehensible—and unlawful activities should not be sufficient to support a finding of probable cause for a search of its members' homes.<sup>195</sup>

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<sup>189</sup> *Contra* Scales v. United States, 367 U.S. 203, 229 (1961) (affirming defendant's conviction not solely because he was member of Communist Party, which advocated the violent overthrow of federal government, but because he was proven to have knowledge of the organization's proscribed advocacy and he specifically intended to accomplish the illegal aims of the organization through violence).

<sup>190</sup> *Contra* United States v. Rubio, 727 F.2d 786, 793–94 (9th Cir. 1984) (declaring that evidence of defendant's membership in Hells Angels would not aid in RICO conviction, thus seizure of his indicia of membership in the organization was improper).

<sup>191</sup> *Contra* Brown v. Texas, 443 U.S. 47, 52 (1979) (expressing disapproval for the officer's asserted reason for detaining the defendant). While the officer claimed that the defendant looked suspicious, he could point to no facts supporting this conclusion. *Id.* "There is no indication in the record that it was unusual for people to be in the alley. The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct." *Id.*

<sup>192</sup> *Contra* Ybarra v. Illinois, 444 U.S. 85, 92 (1979) ("Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search [the bartender], it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.").

<sup>193</sup> The court in *Perez* noted that since its inception, the *Candyman* e-group had approximately 6,300 members, but only 3,397 members were active at the time of Agent Binney's investigation. *United States v. Perez*, 247 F. Supp. 2d 459, 465 (S.D.N.Y. 2003). Under *Martin's* reasoning, it seems that common sense would warrant the search of the homes and computers of former users as well as current members, because the government need not show any current participation to establish probable cause.

<sup>194</sup> *United States v. Martin*, 426 F.3d 68, 75 (2d Cir. 2005).

<sup>195</sup> *See* NAACP v. Claiborne, 458 U.S. 886, 919–20 (1982) ("For liability to be

Rather, the government should be required to offer some evidence that specifically gives reason to believe that the individual committed some criminal act.<sup>196</sup> A “‘person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search . . . .’”<sup>197</sup> From a policy perspective, even if an organization is devoted to illicit purposes, an individual’s membership alone should not be sufficient to establish probable cause unless the act of joining the organization implies that the member *must* have committed some criminal act to become a member, and there are some indicia of the individual’s participation.<sup>198</sup>

In the *Candyman* cases, if the courts defined the e-groups as devoted to both legal and illegal activity, the government still could have established probable cause to search those members who joined the e-groups by sending an e-mail to the “subscribe address.” Those members automatically received e-mails containing child pornography.<sup>199</sup> The government also had sufficient evidence to establish probable cause for a search of

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imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”); *Noto v. United States*, 367 U.S. 290, 299–300 (1961) (Elements of membership crime “must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of . . . an organization . . . might be punished for his adherence to lawful and constitutionally protected purposes . . . .”); *Scales v. United States*, 367 U.S. 203, 229 (1961) (“[A] blanket prohibition of association with a group having both legal and illegal aims . . . would . . . [create] a real danger that legitimate political expression or association would be impaired . . . .”); *United States v. Brown*, 951 F.2d 999, 1002 (9th Cir. 1991) (affirming rule expounded in *Rubio*); *United States v. Rubio*, 727 F.2d 786, 793 (9th Cir. 1984).

[W]here there is no allegation that the enterprise is wholly illegitimate . . . evidence of mere association would not necessarily aid in obtaining a conviction. Something more must be demonstrated; otherwise, the Fourth Amendment would offer little protection for those who are innocently associated with a legitimate enterprise, the affairs of which are being conducted by others through a pattern of racketeering activity.

*Id.*

<sup>196</sup> See *United States v. Coreas*, 419 F.3d 151, 153 (2d Cir. 2005) (implying that affidavit should have at least contained some allegations specific to defendant).

<sup>197</sup> *Id.* at 156 (quoting *Ybarra*, 444 U.S. at 91).

<sup>198</sup> See *Brown*, 951 F.2d at 1003 (“[E]ven if there was a widespread ‘conspiracy of corruption’ in *Majors 2*, as the Government alleges, the information contained in the affidavits fails to establish probable cause to believe that [the defendants] were part of that conspiracy.”).

<sup>199</sup> *United States v. Perez*, 247 F. Supp. 2d 459, 465 (S.D.N.Y. 2003).

those members' homes who posted child pornography in the e-groups, regardless of their subscription methods. But the courts should have required the government to meet a higher burden to establish probable cause to search the members who subscribed via the web, and for whom the government had no additional usage data. Specific evidence of criminal activity could have been obtained through methods other than observing a member's e-mail downloads. For example, some other e-group web hosts like Yahoo might maintain logs of bandwidth usage,<sup>200</sup> or of the files downloaded from an individual IP address.<sup>201</sup> Such data could provide evidence of a member's intent to engage in the illegal activities of the organization and create individualized suspicion.

If the courts classified the e-groups as solely devoted to illicit activity, data regarding usage—in addition to the frequency with which the member signed on and off the site—would be particularly probative in determining whether the individual had downloaded child pornography. But to demonstrate an individual's participation in the e-groups in the *Candyman* cases, the government only offered evidence that the defendants clicked the button to subscribe.<sup>202</sup> This minimum showing might have been permissible had the e-groups required an individual to post an image of child pornography before becoming a member, because then the individual's registration in a group would establish that he was guilty of a crime.<sup>203</sup> However, there was no such evidence in the *Candyman* cases. Thus, the *Coreas* court concluded: "The notion that, by this act of clicking a button, [the defendant] provided probable cause for the police to enter his

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<sup>200</sup> Here, bandwidth usage refers to the amount of data transmitted between the e-group and the individual's home computer. Because picture files and videos are substantially larger in size than other web-content, an observer of bandwidth usage could presumably tell whether an individual was downloading pictures and videos frequently, rather than engaging in text-based chatting.

<sup>201</sup> An IP address (Internet Protocol Address) is a unique internet identifier. Much the same way that an individual's home is identified by a postal address, the individual's internet connection is identified by an IP address. See Techweb: The Business Technology Network, <http://www.techweb.com/encyclopedia/imageFriendly.jhtml?term=IP+address> (last visited Sept. 21, 2006). Internet service providers can use IP addresses to pinpoint the physical location of a computer user. In turn, the police could use this information to obtain a search warrant of the location with the specified IP address.

<sup>202</sup> See *Perez*, 247 F. Supp. 2d at 471. Yahoo did not track the downloads. *Id.*

<sup>203</sup> The *girls12-16's* welcome message stated, "you will need to post something[,]" but did not require members to post child pornography. *United States v. Martin*, 426 F.3d 68, 71 (2d Cir. 2005).

private dwelling and rummage through [his] various . . . personal effects seems utterly repellent to core purposes of the Fourth Amendment."<sup>204</sup>

## V. CONCLUSION

In many instances, the Constitution protects some of the vilest characters in our society. Protection of these individuals, however, ensures that the Constitution guards the rights of all. The First and Fourth Amendments embody some of the most important protections, ensuring that individuals may freely associate with others without worry of prosecution and that individuals may not be subjected to search and seizure without probable cause. If the government submits false evidence to establish probable cause, the defendant may suppress the evidence by showing that 1) the information was material to the finding of probable cause, and 2) the government knowingly submitted the false information or that it did so with a reckless disregard for the truth.

In *United States v. Martin* and *United States v. Coreas*, two cases that are illustrative of the *Candyman* cases, the Second Circuit departed from these central teachings of First and Fourth Amendment jurisprudence. The government alleged that Martin and Coreas subscribed to two online e-groups and that, upon their subscription, like all members, they automatically received e-mails containing child pornography. Absent this assertion, however, the government did not allege that Martin or Coreas specifically engaged in the illegal activities of the groups, nor did it allege that either defendant actually participated in the e-group beyond his initial registration on the web. Based on this information, the FBI obtained search warrants for Martin's and

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<sup>204</sup> *United States v. Coreas*, 419 F.3d 151, 156 (2d Cir. 2005). Although it is unlikely to have occurred in the cases at issue, it is not difficult to imagine a case where an individual might mistakenly click a subscribe button on another website, perhaps in a pop-up ad, and thereby establish probable cause for the search of his home. Of course, as the member registration process became more elaborate, for example, by requiring the disclosure of personal information or the usage of a credit card, the defendant's intent to join the website would be more clearly established. Similarly, if the defendant was a member of multiple fora, it would be very unlikely that his subscriptions were unintentional. See *United States v. Shields*, 458 F.3d 269, 280 (3d Cir. 2006) ("[Defendant's] use of [the email address] 'LittleLolitaLove' to register for both the Candyman and Girls 12-16 e-groups and his failure to cancel his memberships, further undermine any suggestion that he may have stumbled upon the sites, never to return after discovering their content.").

Coreas' homes and discovered child pornography. Later, it was discovered that most members, including Martin and Coreas, opted not to receive e-mails automatically. It was also established that the government had serious doubts as to whether members automatically received e-mails before it obtained the search warrants. Finally, the government knew that absent the automatic e-mailing allegations, there was no evidence that the defendants engaged in illegal activity. Nevertheless, when the defendants appealed their convictions and sought to suppress the evidence obtained pursuant to the search warrants, the court found their causes unsympathetic. The court concluded that probable cause existed to search the defendants' homes based on their memberships alone, and upheld their convictions.

Unfortunately, the implications of the majority view extend well beyond these defendants. While the courts have convicted some of the least sympathetic individuals here, they have also misinterpreted the guarantees of the First and Fourth Amendments. Thus, future defendants may be subjected to searches based on their association alone, even when no evidence exists that such defendants are engaged in anything more than protected speech. Such a rule may be useful for law enforcement when investigating members of illegal organizations, including terrorists; however, it may be allowing the pendulum to swing too far.



